FAREWELL MESSAGE TO THE INTERNATIONAL UNION OF CRIMINAL LAW.[1]

By G. A. VAN HAMEL.

The time at my disposal has not sufficed for preparing a contribution suitable for this Memorial volume. But I should like to add, to the valuable essays of the other contributors, at least a brief message of reminiscence and of farewell.

It is a message of reminiscence; for I have been with our Union throughout the brilliant period of its building up and have had my share therein.

It is a message of farewell; for now, at the age of seventy, under the law of my country, I have been retired from my professorate, and the limitations of human life bid me to expect before long to say farewell to all activities.

My reminiscence begins with my colleagues PRINS and VON LISZT and their exchange of ideas with me, in 1889, upon the possibilities of opening new paths for the international advancement of science, legislation, and practice, in the field of Criminal Law. In the spring of that year, Von Liszt and myself, strolling in the Siebengebirge mountain paths one fine Sunday morning, formed the resolution to found and build an international union dominated by a new spirit. As we saw the then situation, in all countries alike was felt the need of renovation and re-inspiration in the doctrines of criminal law, and a hearty response from all quarters would greet a summons to such a task. My own acquaintance with Von Liszt had begun some time before then. A few years after entering my professorate, I had promised to deliver a paper at the International Prison Congress in Rome, in 1883, on the subject of "The Limits of Judicial Discretion in Determining Sentences." As I proceeded to develop my theme, I found that the question of judicial discretion in sentences was overshadowed by the larger question of the nature of the sentence itself—the fundamental purpose of penalties. Judicial discretion is merely the appli-

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[1] In the volume published to celebrate the 25th anniversary of the "International Union of Criminal Law" (reviewed at p. 307 in the July number of the JOURNAL) is printed a farewell message ("Zur Erinnerung und zum Abschied") by the distinguished scholar Van Hamel, emeritus professor of criminal law in the University of Amsterdam, member of the Senate, and one of the three founders of the Union. As a retrospect and a forecast, it has a world-wide interest. The translation is by Associate Editor Wigmore of this JOURNAL.—ED.

cation to specific cases of the punishment appointed by law. To lay down principles for the former requires first a conscious settlement of one's point of view as to the meaning of penal repression in general. Without a fixed principle to start with, how can one understand the significance of judicial discretion and its proper limits?

It so happened that I had undertaken this particular subject for my paper because the new Dutch Criminal Code, which went into effect about that time, had taken away all limitations on judicial discretion for the minimum penalties and had to that extent sanctioned entire freedom of judgment. And so, in preparing my paper, I found myself obliged to systematize my views on the purpose of punishment in general.

In the course of this task I was profoundly impressed by the masterly essay of Von Liszt (on the Purpose of Punishment), which had appeared in the third volume of his Journal of Criminal Law. I found myself closely affiliated, in doctrinal inclinations, to this fellow-scientist (then at the University of Marburg), and accordingly wrote to him, proposing a meeting at some early opportunity. This meeting took place not long afterwards; and out of it grew a lasting friendship.

Meantime Adolph Prins, in the faculty at Brussels, had published his volume on "Crime and Its Repression." In this powerful work, the use of State force in the repression of crime was examined in a spirit of practical realism; the necessity was emphasized of treating the criminal law as a struggle against criminality: and the consequential doctrine was laid down that we must not stop at symptoms, but must seek to reach causes, precisely as we do with disease, poverty, and other social conditions. Following out these ideas, the treatise of Prins set forth scientific need of tracing out the motives for crime, not merely with a view to doing justice in court, but with a view to developing a science. From the point of view of social philosophy, the thorough study of the general causes of criminality as a social phenomenon would in turn redound to the benefit of the administration of justice.

Prins' work pointed out the distinction between those causes of crime which lay in the man himself and those which germinated in his environment and exercised a fateful influence, not merely on specific conduct, but on the whole character of the individual and even on a criminal group. About this time, moreover, Lombroso's school, in Italy, was developing its positivistic doctrine with its emphasis on

anthropological causes; while in France the social-psychological school, led by Laccassagne and Tarde, was making its advances.

And so, in all directions could be seen an active revival of thought, —a general sense of the need for new knowledge and new achievement, and an effort to satisfy this need. Bench and bar—leaders in practical application, but weaker brethren ever in science—needed to be shown this new trend of things, needed to realize that criminal law must be divested of its dogmatic and purely legal character and infused with a spirit of realism in its principles and aims.

This was the contrast to be emphasized—not realism versus idealism, but realism versus dogmatism. The movement did not signify the abandonment of our ideals; for the ideal, in human affairs, is inseparable from the actual. But it did declare hostilities against the existing dogmatic attitude, against its inherent and dangerous tendency to lose in legalistic pettiness and dialectic technicality the science of actual life and to end in futility.

On such ambitious and inspiring possibilities ran the thoughts of Von Liszt and myself as we took our walks in the secluded valleys of the Siebengebirge mountains. Shortly thereafter, all three of the founders of the Union met and laid out the plans for its organization and its program of work.

And so the memories of that high emprise come vividly before me as I take my leave. But one can not say Farewell without casting a glance at the Present, and at the Future, too. For the Past finds in the Present the bookkeeping of its achievements; and only by looking into the Future can we decide what direction to take in the Present.

That the science of criminal law has lost and is steadily losing many of its dogmatic features—this much seems to me indisputable. In the field of the general doctrines of attempt, complicity and responsibility the emphasis is more and more on the valuation of the subjective element, and less and less on the objective element. This is the true realism, and here the influence of the new thinking is inevitable. The objective element in these aspects of criminal conduct is a merely incidental phenomenon, not an essential quality; and while dogmatism is satisfied to deal with appearances, realism insists on dealing with the essential.

The same tendency shows itself, in the theory of penal repression and its methods, in the form of the multiplication and due adjustment of those methods. Pardon, suspended sentence, probation, and the like—all these modern expedients are nothing more nor less than

not punishing whenever without actual punishment its purpose may be attained. They represent the sacrifice of old dogmatic tradition with its axioms about retaliation—a sacrifice which has already been made in many systems of law and sooner or later will be made in the others.

In the field of juvenile criminality, the dogma of criminal capacity has already been turned out of court in some countries. At the very first annual meeting of the I. K. V. it was repudiated. If it still persists in numerous countries, it is only as an anachronism, which is explainable easily enough on principles of human nature, but on those same principles is bound to be overtaken by the summons to surrender that rapidly draws nearer. Here, too, we see realism triumphant—an acknowledgement of the truth that the sound principles of education find only a false safety in laws based on fantastic arbitrary distinctions.

In the doctrine of criminal responsibility, realism has abolished the fixed boundary line between normal and irresponsible persons. It emphasizes the treatment of defective persons as a special problem, which requires patience for its solution. And in this field the modern controversy over terminology—whether we shall regard the measures as aiming at punishment or at social protection—seems to me only to obstruct and delay the solution; here the anti-dogmatists may well be asked to make a sacrifice to the dogmatists; I recommend them to admit that names do not matter much and to consent without scruple to the retention of the term "punishment."[1]

In the matter of the judge's power over penalties, and his freedom from fixed rules predetermined in the code for all varieties of penalties and circumstances, the new doctrine tends steadily to enlarge his powers. A notable example of this is the apparently universal demand for special juvenile courts. But this single instance must not remain the only one; there is in principle no such radical difference between juveniles and adults that the application of penalties should distinguish the two classes radically. The real place of importance for the development of the criminal law in anti-dogmatic directions lies in the judge's function. For the advancement of the new ideas it is far more important what the judge thinks than what the legislator thinks. England can teach us that; there is no developed science of criminal law in England; but they may well be proud that they possess a judiciary who are ever advancing, ever disposed to regard

[1] "Straf" does duty in German both for "punishment" and "penalty"; so that the word is not quite as harsh as our "punishment."—TRANSL.

the subject realistically—a judiciary esteemed and trusted throughout the nation.

In that direction points the future. *On the cultivation of a competent judiciary every country must rely for the future development of an increasingly realistic criminal law.*

Criminal etiology—research into the causes of criminality—has, to be sure, in its achievements fallen far short of the expectations of a quarter of a century ago. This much we must concede. But why should we doubt of acquiring better knowledge, as the future unfolds? Truth can not be discovered instantly. It needs its centuries. That need not discourage us. Let us not be deterred, by the demand that we know the whole, from at least knowing what is attainable; and the attainable, in my opinion, lies (as I have already said) in the improvement of penal methods, and this in turn lies in the hands of the judge.

And so, my farewell counsel is, first and foremost, *Develop and improve the judge!*